93-739

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

RICHARD E. MOULTON,

Petitioner,

v.

KENNETH C. CORY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD E. MOULTON
1313 "F" Street, #9½
Lincoln, Nebraska 68508
Petitioner (**Pro Se**)
(402) 477-9251

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

I. QUESTIONS PRESENTED FOR REVIEW

1. DOES A UNITED STATES COURT OF APPEALS' DENIAL OF PETITIONER'S GROUNDS OF ERROR ADDRESSING A DISTRICT COURT'S DENIAL OF JURISDICTION CONCERNING RULE 60 OF THE FEDERAL RULES OF CIVIL PROCEDURE CONFLICT WITH DECISIONS OF THIS COURT?

2. HAS A UNITED STATES COURT OF APPEALS SO ABANDONED EXPECTED NORMS OF JUDICATURE, BY ITS OWN AND SANCTIONED LOWER COURT'S PRACTICES, AS TO VIOLATE THE PETITIONER'S RIGHTS OF EQUAL PROTECTION AND DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES THAT INTERVENTION BY THIS COURT BE EVOKED?

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THE PETITIONER, RICHARD E. MOULTON, pro se, petitions this Court to issue a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit entered on July 09, 1993.

II. OPINIONS BELOW

(a) The August 17, 1992 District Court denial of Plaintiff's Motion for Leave to Remand from the Court of Appeals, and Motion for Relief from Final Judgment, **Appx. D,** App. 6

(b) The September 30, 1992 District Court denial of Plaintiff's Motion to Reconsider, **Appx. C,** App. 5

(c) The May 25, 1993 Ninth Circuit Court of Appeals dismissal of Appeal, **Appx. B,** App. 2

(d) The July 9, 1993 Ninth Circuit Court of Appeals denial of Appellant's Petition for Rehearing, **Appx. A,** App. 1

III. JURISDICTION

The date of judgment sought to be reviewed was May 25, 1993; jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1).

IV. CONSTITUTIONAL PROVISIONS INVOLVED

Constitutional provisions involved are the United States Fifth Amendment, the right to due process of law, and the Fourteenth Amendment, applying the Fifth Amendment to the states.

V. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This litigation originates in a diversity action, Richard E. Moulton v. Kenneth C. Cory, Number CV-S-90-502 PMP (LRL), filed in the District Court of Nevada on August 2, 1990, alleging Las Vegas Attorney Cory committed actions constituting legal malpractice, fraud, deceptive trade practices and breach of contract, emphasizing Respondent's refusal to provide those public documents refused Petitioner concerning Las Vegas' Civil Rights violations via false arrests, police brutality/ies and extortion through bonding procedures of the local Justice Court, pinnacle of "Kangarooism." (Dist. Ct. Record 1, **CR 1**)

This case is void of issue litigation, rather, one of endless controversy involving numerous violations of procedural law and patent disrespect for constitutional mandates addressing pro se litigation historically held by this Court. Petitioner claims the Respondent's attorney, Bruce Judd, has successfully and contemptuously violated local Court Rules and employed various fraudulent schemes to gain his ends, and that the lower courts have fortified such actions by a turning away or a granting of opinions supporting these practices of "lawyer trickery": **the concern of QUESTION NUMBER 2**

The District Court's refusal to *hear* Petitioner's F.R.C.P. Rule 60 (b) (2) and (3) "Motion for Relief from Final Judgment *with* Motion for Leave to Apply for Remand", claiming lack of jurisdiction *and* the Appeals Court's obliquely citing only those portions of the *total*

Rule 60 motion in its affirmative support of the lower court comprise: **the concern of QUESTION NUMBER 1**

Shortly after filing, an attorney, Bruce Judd, *by both his unauthorized presence and faulted filings,* started what has degenerated into a mail order "dog fight," void of addressment of issues or a single hearing.

To become fully aware of the "nature" of the case, this Honorable Court's attention is directed to the following " . . . FACTS OF CASE . . . ", showing a litany of abuse and indiscretion. This concise "fact sheet" will be utilized as reference in argument.

B. FACTS OF THE CASE – IN CHRONOLOGICAL ORDER

1. On August 02, 1990 Petitioner filed complaint, a diversity action NO. CV-5-90-502 (PMP) (LRL), in the District Court of Nevada, Las Vegas, one of two main complaints being *refusal to obtain and furnish certain Clark County Justice Court proceedings – public documents – refused to Respondent by the Court.* **CR 1**

2. On September 10, 1990, Respondent's self represented Motion to Dismiss was *filed* and largely overruled with discovery deadlined February 13, 1991. **CR 2**

3. On September 11, 1990 the tardy certificate of mailing thereto was filed. **CR 3**

4. On or about January 03, 1991, Petitioner received papers dated December 28, 1990, concerning discovery, including his **FIRST** notice of personal deposition for February 08, 1991 from an attorney neither of record nor in any way recognized by Respondent.

CR 10, Appx. M, App. 26

5. On January 14, 1991, proper representation was initiated by substitution of Bruce Judd for Respondent by required court order. **Appx. M,** App. 26

6. On January 29, 1991, Petitioner's motion for Protective Order was denied by virtue of Court's interjection into proceedings, enabling an order be filed prior to date of the uncorrected Notice of Deposition. **CR 18, CR 19**

7. On January 31, 1991 Petitioner mailed his First Motion to Modify Court's Scheduling Order, *seeking extension of discovery deadline,* returned for unfounded and insignificant deficiency, satisfied, then filed February 19, 1991. (causing it to be out of phase) **CR 30**

8. On February 06, 1991 Respondent filed a strongly worded *opposition to Petitioner's request to extend discovery deadline* (out of phase) **Appx. N,** App. 28

9. On February 08, 1991 Petitioner failed to honor the uncorrected, faulted Notice of Deposition, followed by Respondent's Motion To Dismiss For Discovery Violations quickly filed the next working day, February 11, 1991. **CR 23**

10. On March 05, 1991 discovery deadline was extended *forty-five* (45) days from order, expiring April 19, 1991, unused for depositions. **CR 33**

11. On April 15, 1991, the Court denied Respondent's Motion To Dismiss for Discovery Violations, sanctioned Petitioner costs plus $300 attorney fees and ***SUA SPONTE*** *ordered the discovery that was to expire four (4) days hence to be extended fifty-six (56) days to June 14, 1991.* **CR 39**

12. On April 19, 1991 Respondent filed a **SECOND** Notice of Deposition for *May 14, 1991* received by Petitioner. **Appx. O,** App. 29

13. On April 22, 1991, Respondent *noticed* Petitioner an unfiled exact copy of the **SECOND** Notice of Deposition for *May 14, 1991* (for the *second* time), received by Petitioner on or about April 27, 1991, which Respondent denies mailing. **Appx. P,** App. 31

14. On April 22, 1991 Respondent, due to alleged but unstated scheduling problems, filed a **THIRD** Notice of Deposition *for May 09, 1991* without cancelling ***EITHER*** Second Notice of Deposition for *May 14, 1991.* Petitioner denied receiving the third notice. **Appx. Q,** App. 33

15. On April 28, 1991, Petitioner returned to Respondent a duplicate of the **SECOND** Notice of Deposition noticed the *second* time, stating thereon inability to attend, which Respondent **ignored** but acknowledged receiving May 01, 1991, by affidavit, as shown in **Appx. R,** App. 35, **Appx. S,** App. 39.

16. On May 08, 1991, **THE DAY BEFORE the May 09, 1991, deposition date** (claimed by Respondent to have been noticed, but denied by Petitioner), Respondent *commenced construction,* by way of affidavit, of his Third Motion To Dismiss For Discovery Violations *which were supposedly yet to happen.* **Appx. S,** App. 39

17. On May 09, 1991, Respondent filed his Third Motion To Dismiss For Discovery Violations. **Appx. S,** App. 36

18. On June 27, 1991, Petitioner's Motion For Protective Order from the **SECOND** Notice of Deposition for May 14, 1991 was denied and sanctioned for $400. **CR 51**

19. On June 27, 1991, the Magistrate Judge Report Recommends dismissal for discovery violations as per *Respondent's* Motion to Dismiss. **Appx. L,** App. 17

20. On July 19, 1991, Judgment and Order to dismiss granted. **Appx. K,** App. 14

NOTE: AS TO THE FIRST APPEAL, **CA-91-16485, (CORY I)**: *Contents* of First and Second appeal necessary to plead QUESTION NO. 2.

21. On September 17, 1991, Notice of Appeal was filed after post-judgment motions denied. **CR 67**

22. Petitioner's *MOTION* For Extension of Time **FROM NOVEMBER 04, 1991,** to file Opening Brief was opposed by Respondent, establishing position of Respondent. **Appx. T,** App. 43

23. On November 01, 1991, Extension was granted to December 04, 1991, the **second (2nd)** briefing schedule, subject to review by a judge should objection to order be filed within ten (10) days of the entry of the order. **Appx. J,** App. 13

24. On November 04, 1991, ***THREE*** days after the granting of the to date unopposed *order,* Circuit Judges Beezer and O'Scannlain untimely interjected into proceedings with *their* order (a) limiting scope of appeal by claiming timeliness of Appeal only partial and (b) overruling the November 01, 1991, order by instituting a **third**

(3rd) briefing schedule (the original), requiring the opening brief due on the *same date:* as *their* order.

Appx. I, App. 12

25. After strong opposition, on December 26, 1991, the Court abandoned its order of November 04, 1991, and instituted yet another briefing schedule, **fourth (4th),** with opening brief due January 25, 1992. Petitioner's open brief *had been* filed December 04, 1991, timely as to the Original Extension granted November 01, 1991.

Appx. H, App. 11

26. On February 19, 1992, the Court denied Petitioner's Motion To Proceed With Appeal In Absence Of Respondent Brief, granted Motion To File Supplemental Brief, and lodged Petitioner's opening brief of December 04, 1991. **Appx. G.,** App. 10

NOTE: AS TO THE SECOND APPEAL, **CA-92-16746 (CORY II)**: The *dismissal* in second appeal forms the basis of Appeal to the United States Supreme Court, concerning Question No. 1.

27. On July 20, 1992, during pendency of first appeal, Petitioner filed *Motion* For Leave To Apply For Remand from Court of Appeals (and) *Motion* For Relief From Final Judgment, based upon newly discovered fraud of the nature of withheld and altered documents.

CR 77

28. On August 10, 1992, the Appeals Court Affirmed dismissal order of July 19, 1991 (first appeal).

Appx. F, App. 8

29. On August 17, 1992, *prior to exhaustion of first appeal,* the District Court denied Petitioner's Motion For

Leave . . . and Motion For Relief . . . , citing Appellant Court's initial affirmation (denial of first appeal) as *sole* basis for decision. **Appx. D,** App. 6

30. On September 30, 1992, the District Court denied Petitioner's Motion For Reconsideration without reference to having read non-considered initial motion. **Appx. C,** App. 5

31. On October 06, 1992, Petitioner filed his Second Notice Of Appeal, **CA-92-16746,** designated as **CORY II. CR 87**

32. On December 10, 1992 the Appeals Court denied Petition For Rehearing and rejected Suggestion For Rehearing En Banc, First Appeal **(CORY I)** **Appx. E,** App. 7

33. On May 25, 1993 the Appeals Court dismissed the appeal, **CORY II**, addressing *only* that portion of Fed. R. Civ. P. 60(b) (2) and (3) interlocutory in nature and therefore non-appealable, concluding with lack of jurisdiction. **Appx. B,** App. 2

34. On July 9, 1993 Petitioner's Petition for Rehearing denied. **Appx. A,** App. 1

VI. ARGUMENTS

FIRST ARGUMENT – QUESTION FOR REVIEW NUMBER 1

Petitioner's second appeal in this case, Cory II, is more than just an extension of the facts raised in his first appeal. Petitioner maintained in Cory I – as its briefs will show – that throughout the District Court proceedings

Petitioner was systematically subjected to a series of discretionary abuses directed toward destroying Petitioner's efforts to litigate his case. By the time Cory I came to appeal, the case had become an issue of "hard core proof" for Petitioner and an obligation to show that Respondent's attorney, Bruce Judd's, *carte blanche* violations of court rules and the Rules of Federal Procedure were both cause and effect for the dismissal of Petitioner's complaint.

To be noted is the Ninth Circuit's initially having before it only the record created in the District Court. However, during the pendency of appeal of Cory I, Petitioner learned of newly discovered evidence of fraud concerning certain transcripts which had been altered by concealing the Clerk's file marks to "prevent Moulton from knowing the origin of the transcripts."[1]

During pendency of the first appeal, Petitioner filed with the District Court a *joint* action: "Motion for Relief from Final Judgment *with* Motion for Leave to Apply for Remand" pursuant to Rule 60(b)(2) and (3) of the Federal Rules of Civil Procedure, showing both newly discovered and additional evidence of Bruce Judd's prior frauds on the Court. Disputes followed, including introduction of numerous affidavits from outside parties. Petitioner urged the District Court to vacate its Judgment of July 19,

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[1] A primary reason for Petitioner's suit was Cory's failure to obtain certain transcripts of Justice Court proceedings in Las Vegas, Nevada, Concerning Petitioner, and after being paid to do so. Cory maintained throughout District Court proceedings "he never had the transcripts." Oddly enough, these papers appeared through discovery, altered, through Bruce Judd. It was not until the briefing schedule had terminated in Cory I did Petitioner discover this fraud, which will be discussed later.

1991, "on the grounds of newly discovered evidence showing fraud and misconduct of Defendant Cory during the proceedings before this Court which renders the judgment illegally taken." Additionally, Petitioner sought leave to apply for remand of the primary appeal in Cory I.[2]

Despite Federal Rules of Civil Procedure, and with blatant disregard for precedent long established by this Court and the Ninth Circuit, the District Court denied Petitioner's **Motion,** *unheard,* as follows:

> "On August 10, 1992, the Ninth Circuit Court of Appeals entered their Memorandum Decision in the above-referenced case which affirms this Court's dismissal of Plaintiff's action, a copy of which is attached hereto.
>
> IT IS THEREFORE ORDERED that Plaintiff Moulton's Motion for Leave to Remand from the Court of Appeals, and Motion for Relief from Final Judgment (#77) is denied." (Appx. D)

This *ipso facto,* citing of the Ninth Circuit's affirmance of Cory I was error, plain and simple, and yet another showing of Petitioner's continual mistreatment by the Courts below. It not only conflicts with decisions of this Court, but with various Circuit Court decisions, all maintaining: *a District Court retains its power, even after or during an appeal, to vacate a judgment under Rule 60 of the*

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[2] It is expressed here that the appeal in Cory II was based on the District Court's denial of Petitioner's *Rule 60* Motion, and not his joint motion for remand. Petitioner requests this Court to take judicial notice of this fact.

Federal Rules of Civil Procedure. **Rehearing** was *heard* but denied. (Appx. C)

Petitioner promptly appealed the denial of his Motion for Relief from Final Judgment (Cory II) which was affirmed by the Ninth Circuit on May 25, 1993 for lack of jurisdiction to entertain the Petitioner's *Motion for Remand.*[3] The panel completely overlooked the merits of Petitioner's arguments:

> "The filing of a notice of appeal divests the district court of jurisdiction to consider a Fed. R. Civ. Proc. 60(b) motion to vacate judgment. *Gould v. Mutual Life Ins. Co.*, 790 F.2d 769, 772 (9th Cir.), *cert. denied*, 479 U.S. 987 (1986). To seek Rule 60(b) relief during the pendency of appeal, the proper procedure is to ask the district court to indicate if it wishes to entertain the motion, and then move this court, if appropriate, for remand of the case. *Smith v. Lujan*, 588 F.2d 1304, 1307 (9th Cir., 1979). The district court's denial of such a request is interlocutory in nature and not separately appealable. *Scott v. Younger*, 739 F.2d 1464, 1466 (9th Cir., 1984). The denial of a motion for reconsideration of an otherwise non-appealable order is itself non-appealable. *Branson v. City of Los Angeles*, 912 F.2d 334, 336 (9th Cir., 1990). We therefore lack jurisdiction to review the district court's denial

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[3] The Ninth Circuit absolutely made no referral to Petitioner's Rule 60 Motion for Relief from Final Judgment although Petitioner returned to show this oversight in his Motion for Rehearing. As with the District Court, this is yet another example of "shoving aside a pro se's case" in its shortest form. This Court's decision in *Standard Oil Co. of California v. United States*, supra, patently proves as much.

> of Moulton's motion for reconsideration of its *order denying his request that the court indicate its willingness to entertain his Rule 60(b) motion. See id.; Scott,* 739 F.2d 1466." (all emphasis added).

On rehearing, Petitioner showed the Ninth Circuit various and indisputable instances considered by this Court and numerous Circuit Courts showing their "lack of jurisdiction" was a misapplication of law. As in the District Court, Petitioner continued to be ignored while the law of the case showed every reason for reversal as exemplified by this Court's rationale in *Standard Oil Co. of California v. United States,* 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976) which holds that "while it is true that a district court's denial of a motion for remand is interlocutory in nature and not separately appealable, the denial of a Rule 60(b) motion *is* appealable. And this is true, regardless of the issuance of an Appeal Court's Mandate." (emphasis added). The Ninth Circuit denied Petitioner's Motion for rehearing on July 9, 1993. (Appx. A)

Because of blatantly obvious error, Ninth Circuit's decision in Cory II must be reversed. In its memorandum opinion shown to this Court, the Ninth Circuit simply sidesteps the indisputable fact that Petitioner was appealing the District Court's denial of his Rule 60(b) Motion for Relief from Final Judgment. The District Court, ignoring its obligation, *never considered the motion*: this fact is reflected in its order where it simply *ipso facto* overruled Petitioner's assertions of fraud by convenient use of the Ninth's affirmance in Cory I. As previously shown, the order blatantly disputes this Court's ruling in *Standard Oil Co. of California v. United States,* 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976).

For distraction, the Ninth Circuit focused on Petitioner's Motion for Remand, while completely ignoring the fact that Cory II was appealable pursuant to the District Court's denial of Petitioner's Rule 60 Motion. Obviously, the ruling of the Ninth Circuit is simply a continuation of the nonsense conducted on the District Court's playground. Petitioner showed the Ninth Circuit the law, placed their fingers on the pages, and read opinions clearly showing error. One such case is *Ingraham v. United States*, 808 F.2d 1075 (5th Cir., 1987) which cited *Standard Oil*, supra.

> "The situation differs in Ingraham. There the issue was first raised in a 60(b) motion filed after the appeal was taken. We are mindful that Rule 60(b) is a 'grand reservoir of equitable power to do justice in a particular case, (citations omitted). As such, a Rule 60(b) *motion may be entertained* in the district court at any time within a year of judgment, regardless of the pendency or even the completion of appeal. *Standard Oil Co. v. United States*, (citations omitted); *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928 (5th Cir., 1976) (remanding a 60(b) motion dismissed by a district court as untimely solely because appeal was pending). [B]ecause the 60(b) motion may be separately considered pending appeal, a denial of such a motion while the appeal of the judgment is pending, is itself separately appealable. See *Commonwealth of Puerto Rico v. SS ZOE COLOCOTRONI*, 691 F.2d 39 (1st Cir., 1979). *Washington v. Board of Education*, 498 F.2d 11 (11th Cir., 1974). In a case, such as the Ingraham case, where the 60(b) motion is filed after the appeal is noticed, an appeal from the ruling on that motion *must be separately taken*

> *if the issue raised in that motion is to be preserved for appeal . . . " Ingraham,* Id at 1080-81 (all emphasis added).

Petitioner did exactly as the law directed. Yet, for reasons shown *and reasons unknown,* Cory II is now before this Court upon a glaring, patent and fundamental set of errors by the District Court and the Ninth Circuit.

> **This Court only need compare the District Court's Order denying Petitioner's Rule 60(b) motion and the Ninth Circuit's allegations of a "lack of jurisdiction" to hear the appeal: THE CIRCUIT COURT'S IGNORING THE INESCAPABLE ISSUE BY DIVERSIONARY DIALOGUE IS A PATENT REJECTION OF SAME.** (Appx. D, B)

SECOND ARGUMENT – QUESTION FOR REVIEW NUMBER 2

This is a case where a non-lawyer has relied on the law and the lower court's obligations to mete out fair play, only to become embroiled in intrigue and foul play. Petitioner's initial complaint against Respondent is just as important now as the day of filing, yet Petitioner's right to self-representation has been treated so as to pervert our judicial system, mock this Court's teachings, and thereby offend the Constitution.

From the beginning of this litigation to present, never has the District Court called an evidentiary hearing. However, Petitioner has exhausted over three years with efforts to litigate and appeal simple factual issues as previously mentioned, and in both the District Court and

the Ninth Circuit Court of Appeals. Not only has Petitioner complained of attorney wrong doings but also the District Court's acceptance of his unethical line of behavior. The District Court and Respondent operated in such a manner that their efforts effectively disrupted Petitioner's pro se efforts to prosecute his claims, and they yet prevail.

The lower courts seem to have become confused as to the traditional monitoring afforded pro se litigants; all indeterminates or doubts have favored the legally trained Respondent(s). Indifference toward the pro se is the rule.[4]

Both lower courts and the Respondent's attorney, Bruce Judd,[5] have united in their efforts to disallow Moulton's litigation of his complaint. Seemingly small or resolvable issues have been falsely magnified to create a basis of argument by both Respondent and both lower courts.[6]

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[4] For example, how is a pro se litigant to form opinions of Local Rules when *his* pleading is returned for a picayune unrecorded transgression while Respondent is allowed filing absent service, attorney entrance absent consenting order (see both, Dist. Ct. Civil Docket sheet no. 3, 14) and Circuit Court violation of its *own* order and Local Rules? (Appx. I, J)

[5] "Bruce Judd" will be appropriately substituted for or used in conjunction with "Respondent" as he is personally involved in pleadings by affidavits.

[6] The Magistrate Judges' " . . . Report and Recommendation . . . " far exceeds necessity; it is chastisement at best, better dubbed " . . . Cory's (Respondent's) *Amended* Motion to Dismiss." (Appx. L) The Appeals Court, however, has less *obvious* discretional abuse in their opinions, as will be noted by selective

Most court action seats with the predominantly obscuring blanket of "discretion," whether or not abused, and to what possible degree. The following instances of *abuse* may *seem* to enjoy this grey area sanctuary, but their coalescence reveals an *abandonment* of discretion.

This Honorable Court is urged to examine this more complete account of abuse previously outlined in **V., B, FACTS OF THE CASE, P.**, observing appendices and case law.

Abuse of discretion commenced with the District Court's allowing pleadings and discovery papers to be filed in violation of its Local Rule 120-7 (c) requiring " . . . leave of the court . . . " concerning substitution of Attorneys.[7] (Appx. M)

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fact-finding (Appx. F), or simply indifference toward the Obvious (Appx. B) or a Confounding hodge-podge shuffle of briefing dates. (Appx. H, I)

[7] Rule 120.7 et seq. governs the appearance and substitution of attorneys in the District Court of Nevada. Accordingly, Kenneth Cory's initial appearance with his Motion to Dismiss represents the Respondent's initial "counsel of record." It was only *after* Petitioner sought default proceedings against Respondent, some six weeks into the District Court's Scheduling Order, that Bruce Judd abruptly intruded into the case without motion, leave of the Court, or upon notice and stipulation of the parties - not even a "How do you do . . . ". Judd, with absolutely no standing in the case, filed an Answer for Respondent, a "First Notice of Deposition of Richard E. Moulton," and an Opposition to Petitioner's request for Default, plus serving Petitioner with various discovery requests. The District Court will later sanction Petitioner $300.00 for failing to appear for "Bruce Judd's" deposition, and for rightfully defending against a deposition demanded by Bruce Judd who was not attorney of record at the time of the Deposition Notice. This constitutes the benchmark

A pro se litigant rightfully looks to the court for guidance, usually by its precedent establishing *actions*. How, then, was the Petitioner to determine the relative importance of *responding* to, let alone *attending*, deposition served by a virtual stranger? Any confusion, doubt, or hesitancy concerning the necessity of adhering to any faulted notice was compounded by the *court's* waiver of rules in filing the Answer and Deposition Notice. (CR 9, 10)

One asks: who *is* the rule abuser: Bruce Judd, the Court, or the Petitioner, and what precipitated what? The court is the major cause; making the Magistrate's Report and Recommendation plus Dismissal Order wholly inappropriate documents. (Appx. K, L) Therein lies the basis of abuse.

Although Respondent initially appeared on his own behalf through a Motion To Dismiss, Rule 12, of the Federal Rules of Civil Procedure, he failed to file an Answer. Petitioner noticed Respondent (Cory) on December 15, 1990 of commencement of default proceedings. Bruce Judd, illegitimate attorney, answered *prior* to any authority *granted by the court* (CR 12, 14).[8] This is but the

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which precipitated the dispute in this case. Petitioner requests this Court to take judicial notice of these very important events. (*See* District Clerk's Civil Docket Sheet.)

[8] Technically, Petitioner deserved judgment at a time well before Bruce Judd illegally entered the case. When Respondent failed to make an Answer to the Complaint, Petitioner sought default judgment pursuant to Rule 55 of the Fed. R. Civ. Proc. - This was done, in reality, *prior* to Respondent's Answer and prior to Judd's "Motion to Substitute Attorney." However, Petitioner's default papers were returned by the District Court

first of Bruce Judd's being saved by the gavel. Violation of L.R. 120-7(b)(c): **THE FIRST ABUSE**

Petitioner disregarded all the illegitimate discovery requests filed December 28, 1990: Admissions, Production and Deposition. Neither the District Court nor the Magistrate had ever considered application of Local Rule 190(f)(2) which clearly mandates the parties engage in "discovery compromise" prior to the Court's entertaining discovery motions. However, Petitioner pursued his own Admissions and Production of Documents and moved for an extension of time to do so.

Apparently confident of the District Court's support, Judd vehemently objected, saying "there is no good reason to extend discovery . . . the case is not complex . . . [and], the case does not need to go on for purposes of discovery." (Appx. N) These objections came a mere two (2) days prior to his yet faulted deposition date of February 08, 1991. (CR 21) On February 11, 1991 Respondent filed his second Motion for Discovery Violations (Petitioner's supposed failure to honor his deposition) wherein he bemoans his prejudiced position.[9] (CR 23) On March 05, 1991, lapsed discovery was extended to

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Clerk, unfiled, on the allegation that Petitioner had failed to utilize a so - called "form" required by Local Court Rule. There is no such rule. *See*: District Clerk's Docket Sheet at entry #11, and compare with the Local Rules of court for the District of Nevada. See also CR - 13 for rejection note and "required form."

[9] It is obvious from Judd's failure to advantage himself of discovery depositions, during the March 15 - April 19, 1991 extension, he was interested in discovery only to provide a vehicle for a "discovery violation throwout."

April 19, 1991, allowing both parties ample time to complete discovery, which they did, except for depositions. Petitioner chose none, *nor did Judd.*

The claims of prejudice were thereby found to be false: forty-five (45) days passed without a second deposition notice from Respondent. If there was any sincerity in his claims he would have noticed deposition. He did not. Either *that* or he had somehow been assured of a favorable outcome to the "deposition dilemma", which was coincidentally initiated along with the requested *de novo* review, by order of April 15, 1991. Therein the court (1) extended *SUA SPONTE obviously unwanted* discovery for *two* full months to June 14, 1991, and (2) sanctioned petitioner $300.00 for failure to attend an obviously faulted notice by an attorney not of record, but, rather, a self-proclaimed "midstream lawyer" (Black's Law Dictionary recognizes no such term). Thus are established the **SECOND** and **THIRD** abuses.

Judd suddenly awakened to the (his) *unwanted* discovery invitation and filed deposition notices in what was to become the major concern of Cory I: a dispute concerning the circumstances of controversial deposition notices. Petitioner calls this Court's attention to revealing and highly questionable circumstances: (1) Bruce Judd noticed Petitioner for a second deposition over his own objections to further discovery, (2) the second deposition was made possible by a *sua sponte* order of the District Court extending discovery absent of any indication requiring a second deposition, and (3) the notice was initially slated for May 14, 1991 but Bruce Judd alleged

he encountered "scheduling problems" and "sent Petitioner" another deposition notice moving the date forward to May 9, 1991. Facts show Judd filed his May 9, 1991 notice in the Court while sending his May 14, 1991 notice, *a second time*, to the Petitioner. These events are enforced by Judd's further episodes of questionable activities regarding altered documents, discussed later. (See V, B, 12-15 and Appendices O, P, Q and R).

In the pleadings relevant to the second deposition, this Court will notice that Bruce Judd swore out his affidavit supporting his final Motion to Dismiss for Discovery Violations on *May 8, 1991*, **one day** prior to the appearance date Judd allegedly scheduled for Petitioner's Las Vegas deposition, and *six days* prior to the May 14th date Judd twice sent Petitioner.[10] (Appx. S) This was fraud on the Court. Judd knew what he was doing; he carefully designed these events as they ultimately occurred with lawyer trickery. With the discovery deadline a month away, Judd frittered away the time, not noticing another deposition. He was obviously confident of a favorable opinion of a Magistrate Judge's unnecessarily scathing report and a court's accommodating *coup-de-grace*: Judd's long sought dismissal.[11] (Appx. L, K)

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[10] A *faux pas extraordinaire*: the pre-*coup-de-grace*. It was not that a notary was unavailable on May 09, 1991, she (Fogleburg) was, both the 8th *and* 9th. Unchecked anticipation exposed Judd's fraud; he *knew* there would be no deposition; he had sent out false notices.

[11] The Magistrate cited the second failure to appear for deposition as cause for dismissal. But it took two; therefore *either* was cause for dismissal: a deposition noticed by a stranger, barred by Local Rules, without authority or identity, or

Such controversy over deposition notices required an evidentiary hearing that did not happen: **THE FOURTH ABUSE.**

The Magistrate's Report,[12] the additional $400.00 sanction and the dismissal, at the least, comprise **THE FIFTH ABUSE.**

As to the harshness of the dismissal, District Courts have long been required to consider pro se pleadings with a much less stringent standard of scrutiny than pleadings prepared by lawyers. *Haines v. Kerner*, 92 S.Ct. 594, 404 U.S. 519, 30 L.Ed.2d 652 *reh. den.*, 92 S.Ct. 963, 405 U.S. 948, 30 L.Ed.2d 819 (1972).

However, this Court in *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984), made the statement intended in *Haines* self-explanatory:

> " . . . We frequently have stated that pro se pleadings are to be given a liberal construction. E.g., *Haines v. Kerner*, (citations omitted). If these pronouncements have any meaning, they *must*

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a deposition noticed by trickery and contrary to that filed. In his eagerness to chastise the Petitioner, the Magistrate totally ignored the facts revealing Judd, in the least, suspect of wrong doing. As ever, Petitioner can do no good; Judd could do no wrong.

[12] Petitioner promptly objected to the Magistrate's Report as being "factually incorrect," "that defendant had failed to show the required prejudice for the lack of Plaintiff's deposition," and the Magistrate had "maliciously ridiculed Petitioner for his assertions through his Motion for Protective Orders . . . and for claiming the deposition in question would cause an unfair advantage against Petitioner at trial" (CR 54, pgs. 4-6)

> protect the pro se litigant who simply does not properly demonstrate her motion or pleading in the terms used in the Federal Rules. If Respondent was not pleading for relief in the District Court, one wonders what the majority thinks she was doing there." *Baldwin*, 104 S.Ct. at 1732.[13]

Further, the Ninth Circuit's case law archives point to *McCabe v. Arave*, 827 F.2d 634 (9th Cir., 1987): "Reasonable allowances are to be made for pro se litigants, and their papers are to be read liberally." Furthermore, from the Second Circuit in *Traguth v. Zuck*, 710 F.2d 90 (2nd Cir., 1983) . . . "The right to self-representation does not exempt a party from compliance with relevant rules of procedural and substantive law . . . [however] . . . *it should not be impaired by harsh application of technical rules.*" (emphasis added; citing *Birl v. Estelle*, 660 F.2d 592, 593 (5th Cir. 1981)).

When comparing the treatment of Petitioner's case with this Court's lessons given the District Courts in *Haines v. Kerner*, supra, and cases previously cited, it makes one wonder if the Courts of this nation write these opinions for lack of nothing better to do, to be read as fiction and lacking none other than legal entertainment?

> "The rules are a means – not an end of justice . . . in final analysis, a court has a responsibility to do justice between man and man; and general principles *cannot justify denial of a party's fair day in court except upon a serious showing of*

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[13] *And*: if Petitioner was not pleading for relief from final judgment, during the pendency of his first appeal pursuant to Rule 60(b) in the District Court, then what was *he* doing there?

willful default." B.F. Goodrich Tire Company v. Lyster, 328 F.2d 411, 416 (5th Cir., 1964) (emphasis added).

Throughout the appeals in this case, Bruce Judd has shifted fault to the Petitioner with one fabricated excuse after another while the District Court seemed to recline in amusement while this layman pro se party worked himself from one frustration to another. This is nonsense; this Court has never permitted this type of discretionary abuse or unethical conduct in the past. It should not now.

Upon appeal, the Ninth Circuit rejected application of its own precedent - case law which was patently directed to the issues at hand. For example, in *Tolbert v. Leighton,* 623 F.2d 585 (9th Cir., 1980), the District Court dismissed a Plaintiff's legal malpractice suit with prejudice for a failure to prosecute based on a failure to attend a pretrial conference. The Ninth Circuit, however, reversed under the opinion that: "[W]e agree that it is an abuse of discretion to dismiss a plaintiff's case for failure to prosecute where (1) the only evidence of dilatoriness is his attorney's failure to attend a pretrial conference, (2) the court *has not warned* that a failure to attend will create a *risk of dismissal,* and (3) the case is still young." *Tolbert,* Id at 587. (emphasis supplied). In the instant case, the litigation in the District Court ran less than a year, including the unnecessary time taken when Petitioner was compelled to seek default judgment, protesting Bruce Judd's violations of the court rules, and waiting some six weeks for an Answer to the complaint. Not once did the District Court make an indication that it contemplated dismissal.

Rather, it appears to have substituted any form of guidance, be it opinion or hearing, for the tactic of silence, the companion to entrapment. The Petitioner has been manipulated, set up, and knocked down, at every turn of the proceedings.

"FACTS OF THE CASE . . . ", V B 1, identifies refusal by Clark County, Nevada (Las Vegas) Justice Court to furnish public documents as did Petitioner's past attorney, the Respondent. However, in compliance with document production and admissions Respondent furnished copies of five (5) separate transcriptions he was hired to obtain but denied having. To somehow hide their source, the word "ORIGINAL" had been removed. Petitioner later compared the altered documents with those furnished by the Justice Court as a result of constant petitioning. The fraud is obvious. (Appx. V, W plus X and Y as typical). Petitioner's affidavit affirms the fraud. (Appx. Z)

The District Court's denial to *hear* Petitioner's Rule 60 Motion constitutes, in itself, **THE SIXTH ABUSE** and the resultant quashing of evidence of fraud therein constitutes **THE SEVENTH ABUSE**. The admission by the District Court of *error* by not hearing the original motion but reversing its position and hearing the Motion to Reconsider *only* without correcting its *first* error is **THE EIGHTH ABUSE.** (Appx. C)

Petitioner's first and timely filed paper in CA-91-16485 (Cory I) was motion for enlargement of time from November 04, 1991, to file opening brief. Respondent filed his objection to *motion* October 30, 1991. (Appx. T). On November 01, 1991, the court ordered a new briefing schedule of December 04, 1991 to Open and

January 07, 1992 to Answer, subject to review by judge if opposing counsel filed opposition to the *order* within the following ten days, per local rule, which was never done. (Appx J).

Knowing Respondent's filing preceded the November 01, 1991 order, as the prerequisite of establishing position of opposing counsel, *on November 04, 1991,* (prior to the November 11, 1991 expiration date) Judges Beezer and O'Scannlain vacated the order of November 01, 1991 and reinstated the original schedule commencing *November 04, 1991.* Of note is the order date of November 01, 1991, being Friday, and Monday, *November 04, 1991,* being the first and last chance for the judges to effect **THE NINTH ABUSE**, as Petitioner could later claim reliance upon the November 01, 1991, order, *if in effect* through November 04, 1991, being his *initial* due date. (Appx. I).

Petitioner pled Reconsideration and timely filed his opening brief December 04, 1991. Twenty-two days later and fifty-two days after the order of November 04, 1991, on December 26, 1991, these same judges recanted but again violated their local rules and ordered a *fourth* briefing schedule, Opening January 25, 1992. (Appx. H).

Judd, realizing he should have answered January 07, 1992, in accordance with the still legitimate but illegally overridden order of November 01, 1991, sent a tardy overnight letter, filed January 08, 1992, to the Ninth Circuit pleading confusion and soliciting direction, which was "to file immediately." (Appx. U). A now secure Judd filed his sixteen day tardy Answer Brief and Moulton his required timely "Motion to Proceed with Appeal in

Absence of Appellee's Brief" on January 23, 1992. A reply was filed February 03, 1992.

The Appellant's "Motion to Proceed with Appeal in Absence of Appellee's Brief" was not denied until February 19, 1992 (Appx. G). The January 06, 1992 filing of Appellant's "Notice to Possibly File an Amended Opening Brief" was, in itself, of no significance. Appellee filed his Answer Brief on January 23, 1992, after which Appellant filed his Amended Opening Brief January 27, 1992.

What the Court *did not* do was revert back to the scheduling order they erroneously overruled and let the Appellee be responsible for his Answer Brief originally due January 07, 1992 – after all, litigants were in the throes of argument not decided until February 19, 1992. Appellee had failed to insure himself against a future, unknown order. No matter, the Court issued a predated insurance policy in the form of that complex, baffling, and unfounded order of February 19, 1992. *As in the past, Judd was saved by the gavel.*

The Appellee's extrication from his irresponsibility in *not* preparing for a possible negative order by the Appeals Court is in marked contrast with that same Court's (erred) *reversion* of Appellant's due date to the same date *of its order*. Such action epitomizes prejudice of the highest degree.

The unauthorized November 04, 1991 order also limited scope of Appeal. Investigation proclaiming an apparent tardy filing in District Court curiously failed to observe the significance of two consecutive out of phase pleadings, one containing a notation of same, immediately followed by a *separate entry* noting same. (Appx.

M, No's. 58, 59 and 60) This assured intentional oversight constitutes **THE TENTH ABUSE.** The strenuously opposed decision was silently vacated.

There is abuse of discretion, there is absence of discretion and there is simply abuse; ten examples of the latter have been shown.

VII. REASON FOR GRANTING THE PETITION FOR CERTIORARI

The Ninth Circuit showed no hesitancy in underwriting the wayward course the district court and Bruce Judd had plotted, as its orders in Cory I attest: a continuation of the prejudices and discretionary abuses previously constructed in the district court. The litigation is one-sided; it champions unauthorative dogma holding a pro se party who dares stand tall to his case is without constitutional protection, while leaving his back uncovered. This merely begs the question: Whose case is it? The District Court's, Bruce Judd's, or the Respondent's? The Civil Docket Sheets show this Court that Petitioner brought his complaint against Kenneth Cory, paid his filing fee, and did everything feasible in his desperate attempts to merely come to court. But the record shows that day was doomed.

Granting a Petition for Writ of Certiorari would guarantee the Petitioner the opportunity to litigate his valid complaint.

CONCLUSION

Historically, this conclusion would briefly cite argument, concluded by plea. The Petitioner believes having pled adequately.

But this Writ's review reveals forces and factors eclipsing the technicalities of litigation. Moulton v. Cory is a simple case, unworthy of the unpronounced but obvious zeal exercised by both courts' dedication to the Petitioner's demise.

Of note are the unabashed and perverse orders of the Appeals Court at the onset of Cory I, rivaled by the Trial Court's embarrassing exposure of prejudicial intent by its contradictory refusal to hear and then partially hear Petitioner's Rule 60 Motions: the "half and half" hearing.

Most ominous is the Appeals Court's boldness, in parroting a lack of jurisdiction, with wholly misleading diversionary citations, proffered as guise of "faulted judgment" rather than the true objective of barring the Petitioner from trial by jury.

THE PETITIONER'S RELENTLESS PURSUIT OF THIS LITIGATION ULTIMATELY FORCED THE APPEALS COURT'S GAMBLING UPON A SUPREME COURT'S RESTRICTED DOCKET TO PRECLUDE EXPOSURE OF ITS ACTIONS AND, MORE OMINOUSLY, THEIR POSSIBLE MOTIVATIONS.

THE CASE AT BAR TRANSCENDS MOULTON V. CORY. THERE EXISTS AN OBVIOUSLY BLUNT CHALLENGE OF THE AUTHORITY OF THE SUPREME COURT OF THE UNITED STATES.

Petitioner is a judicial refugee, the pawn of that challenge, and so deserves a Writ of Certiorari issue to the Court of Appeals for the Ninth Circuit, for him and for similarly hapless litigants certain to follow.

Respectfully submitted,

RICHARD E. MOULTON
1313 "F" Street, #9½
Lincoln, Nebraska 68508
(In Proper Person)
(402) 477-9251

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD E. MOULTON, Plaintiff-Appellant, v. KENNETH C. CORY, Defendant-Appellee.	No. 92-16743 DC No. CV-90-00502-PMP ORDER **(FILED JULY 9, 1993)**

Before: HUG, WIGGINS, and THOMPSON, Circuit Judges.

Appellant's petition for rehearing is **DENIED**.

APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD E MOULTON, Plaintiff-Appellant, v. KENNETH C. CORY, Defendant-Appellee.	No. 92-16743 D.C. No. CV-90-00502-PMP MEMORANDUM* **(FILED MAY, 25, 1993)**

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Submitted May 12, 1993**

Before: HUG, WIGGINS, and THOMPSON, Circuit Judges

Richard E. Moulton appeals pro se the district court's denial of his motion for reconsideration of its order denying his request that the court indicate its willingness to entertain his Fed. R. Civ. P. 60(b) motion to vacate judgment. We dismiss for lack of jurisdiction.[1]

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 3404.

[1] Cory's motion for attorney's fees and costs pursuant to Fed. R. App. P. 38 is denied.

BACKGROUND

On July 19, 1991, the district court dismissed Moulton's legal malpractice action against his former attorney, Kenneth C. Cory, for failure to attend a scheduled deposition. Moulton filed a timely notice of appeal.

On July 20, 1992, during the pendency of the appeal, Moulton filed a "Motion for Leave to Apply for Remand from the Court of Appeals and Motion for Relief From Judgment," in which he asked the district court to indicate its willingness to entertain a Rule 60(b) motion in order to enable him to move this court for remand of his case.

On August 10, 1992, we affirmed the district court's judgment dismissing Moulton's legal malpractice action against Cory. *See Moulton v. Cory*, No. 91-16485, unpublished memorandum disposition (9th Cir. Aug. 10, 1992). Moulton filed a timely petition for rehearing and suggestion for rehearing en banc.

On August 17, 1992, shortly after our decision was rendered, the district court denied Moulton's motion to entertain his Rule 60(b) motion. On September 16, 1992, Moulton filed a motion for reconsideration, which the district court denied. Moulton appeals the denial of this motion.

On December 10, 1992, we denied Moulton's petition for rehearing and suggestion for rehearing en banc in No. 91-16485. On April 13, 1993, we issued the mandate.

DISCUSSION

The filing of a notice of appeal divests the district court of jurisdiction to consider a Fed. R. Civ. P. 60(b) motion to vacate judgment. *Gould v. Mutual Life Ins. Co.*, 790 F.2d 769, 772 (9th Cir.), *cert. denied*, 479 U.S. 987 (1986). To seek Rule 60(b) relief during the pendency of an appeal, the proper procedure is to ask the district court to indicate if it wishes to entertain the motion, and then move this court, if appropriate, for remand of the case. *Smith v. Lujan*, 588 F.2d 1304, 1307 (9th Cir. 1979). The district court's denial of such a request is interlocutory in nature and not separately appealable. *Scott v. Younger*, 739 F.2d 1464, 1466 (9th Cir. 1984). The denial of a motion for reconsideration of an otherwise non-appealable order is itself non-appealable. *Branson v. City of Los Angeles*, 912 F.2d 334, 336 (9th Cir. 1990). We therefore lack jurisdiction to review the district court's denial of Moulton's motion for reconsideration of its order denying his request that the court indicate its willingness to entertain his Rule 60(b) motion. *See id.; Scott*, 739 F.2d at 1466.

DISMISSED

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

RICHARD E. MOULTON, Plaintiff, v. KENNETH C. CORY, Defendant.	CV-S-90-502-PMP (LRL) ORDER **(FILED SEPT. 30, 1992)**

The Court having read and considered Plaintiff Moulton's Motion to Reconsider In Re: Motion for Leave to Apply for Remand and Motion for Relief from Final Judgment (#82), filed September 16, 1992, Defendant's Response in opposition thereto (#83), filed September 18, 1992, and Plaintiff's Reply (#84), filed September 25, 1992, and good cause appearing,

IT IS ORDERED that Plaintiff's Motion to Reconsider In Re: Motion for Leave to Apply for Remand and Motion for Relief from Final Judgment (#82) is denied.

DATED: September 29, 1992

/s/ P M P
PHILIP M. PRO
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

RICHARD E. MOULTON, Plaintiff, v. KENNETH C. CORY, Defendant.	CV-S-90-502-PMP (LRL) ORDER **(FILED AUG. 17, 1992)**

On August 10, 1992, the Ninth Circuit Court of Appeals entered their Memorandum Decision in the above-referenced case which affirms this Court's dismissal of Plaintiff's action, a copy of which is attached hereto.

IT IS THEREFORE ORDERED that Plaintiff Moulton's Motion for Leave to Remand from the Court of Appeals, and Motion for Relief from Final Judgment (#77) is denied.

DATED: August 17, 1991

/s/ P M P
PHILIP M. PRO
United States District Judge

APPENDIX E

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD E. MOULTON, Plaintiff-Appellant, v. KENNETH C. CORY, Defendant-Appellee.	No. 91-16485 D.C. No. CV-90-00502-RMP (L Nevada) ORDER **(FILED** **DEC. 10, 1992)**

Before: TANG, BEEZER, and KOZINSKI, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX F

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD E. MOULTON, Plaintiff-Appellant, v. KENNETH C. CORY, Defendant-Appellee.	No. 91-16485 D.C. No. CV-90-00502-PMP(L MEMORANDUM* **(FILED AUG. 10, 1992)**

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Submitted July 29, 1992**

Before: TANG, BEEZER, and KOZINSKI, Circuit Judges.

Richard E. Moulton appeals pro se the district court's dismissal of his diversity action against his former attorney for failure to attend a scheduled deposition. We review for an abuse of discretion, *Fjelstad v. American Honda Motor Corp.*, 762 F.2d 1334, 1337 (9th Cir. 1985), and we affirm.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

If a party fails to appear at a noticed deposition, a district court may impose sanctions, including dismissal. *See* Fed. R. Civ. P. 37(d). A district court has the discretion to impose the extreme sanction of dismissal if there has been "flagrant, bad faith disregard of discovery duties." *Wanderer v. Johnston*, 910 F.2d 652, 655-56 (9th Cir. 1990) (citing *National Hockey League v. Metro Hockey Club, Inc.*, 427 U.S. 639 (1976)). Because the sanction of dismissal is such a harsh penalty, the district court must weigh five factors before imposing dismissal: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to . . . [the party seeking sanctions]; the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." *Id.* at 656 (quoting *Malone v. United States Postal Serv.*, 833 F.2d 128, 130 (9th Cir. 1987), *cert. denied*, 488 U.S. 819 (1988)).

Moulton missed two scheduled depositions without giving Cory notice that he could not attend. After he missed the first deposition, the district court declined to grant Cory's motion to dismiss and instead required Moulton to pay the costs of the deposition and $300 attorney's fees. After Moulton missed the second deposition, the district court applied the five-part *Malone* test and dismissed the entire action. The district court did not abuse its discretion by imposing sanctions and ultimately dismissing the action.

AFFIRMED.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD E. MOULTON, Plaintiff/Appellant, vs. KENNETH C. CORY, Defendant/Appellee.	No. 91-16485 DC# CV-90-00502-PMP Nevada (Las Vegas) ORDER **(FILED FEB. 19, 1992)**

Before: SNEED, Circuit Judge

The court is in receipt of appellant's motion to proceed with appeal in absence of appellee's brief, appellee's opposition, appellant's response to the opposition and appellant's motion to file an amended opening brief.

Appellant's motion to proceed with appeal in absence of appellee's brief is denied.

Appellee's response to appellant's motion to proceed with appeal in absence of appellee's brief is construed as a motion to file a late answering brief and is granted.

Appellant's motion to file an amended opening brief instead of his initial brief filed December 4, 1991 is granted. The amended opening brief recieved January 29, 1992 shall be filed. The opening brief filed December 4, 1991 shall be lodged.

Appellee's motion to file a supplemental brief is granted. The supplemental brief received January 29, 1992 shall be filed.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD E. MOULTON, Plaintiff-Appellant, vs. KENNETH C. CORY, Defendant-Appellee.	No.91-16485 DC# CV-90-00502-PMP Nevada (Las Vegas) ORDER **(FILED DEC. 26, 1991)**

Before: BEEZER and O'SCANNLAIN, Circuit Judges

Appellant's motion for reconsideration of this court's November 4, 1991 order is granted. Because appellant had demonstrated that his motion for reconsideration in the district court was served within 10 court days after the entry of judgment, the order of this court limiting the scope of the appeal is vacated. *See* Fed. R. Civ. P. 6(a) and 59(e). The briefing shall proceed as follows: appellant's opening brief is due within 30 days from the date of this order; appellee's answering brief is due within 30 days from the date of service of appellant's brief; and appellant's optional reply brief is due within 14 days from the date of service of appellee's brief.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD E. MOULTON Plaintiff-Appellant, vs. KENNETH C. CORY, Defendant-Appellee.	No. 91-16485 DC# CV-90-00502-PMP(L) Nevada (Las Vegas) ORDER **(FILED NOV. 4, 1991)**

Before: BEEZER and O'SCANNLAIN, Circuit Judges

A review of the record demonstrates that the notice of appeal, filed September 17, 1991, is timely only as to the district court's August 22, 1991 order denying appellant's second motion for reconsideration. Because the motion for reconsideration was not filed within 10 days of the entry of judgment, the notice of appeal is not timely as to the underlying judgment entered on July 19, 1991. *See* Fed. R. Civ. P. 59(e); Fed. R. App. P. 4(a)(4). Consequently, the scope of this appeal is limited to review of the August 22, 1991 denial of reconsideration. The briefing schedule established September 25, 1991 shall continue in effect.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD E. MOULTON, Plaintiff/Appellant, vs. KENNETH C. CORY, Defendant/Appellee.	No. 91-16485 DC# CV-90-00502-PMP Nevada (Las Vegas) ORDER **(FILED NOV. 1, 1991)**

Appellant's motion for an extension of time in which to file the opening brief is granted. The opening brief is due December 4, 1991. Appellee's brief is due January 7, 1992. The optional reply brief is due 14 days from service of the answering brief.

No further extension of time to file this brief will be granted absent the showing of extraordinary circumstances required under Ninth Cir. R. 31-2.3(c).

Movant is informed that a motion for an extension of time to file a brief should include the position of opposing counsel. Ninth Cir. R. 31-2.3(b)(8).

This order is subject to reconsideration by a judge if any objection is filed within ten (10) days of the entry of the order.

For the Court:

CATHY A. CATTERSON
Clerk of the Court
/s/ Robert Allen
Robert Allen
Deputy Clerk

APPENDIX K

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

RICHRAD [sic] E. MOULTON,
Plaintiff,

v.

KENNETH C. CORY, Defendant.

CASE NUMBER:
CV-S-90-502-
PMP-(LRL)
JUDGMENT IN
A CIVIL CASE

(FILED JUL 19 1991)

Decision by Court. This action came to be considered by the Court. The issues have been considered. A decision has been renderd.

IT IS ORDERED AND ADJUDGED Magistrate Judge's Report and Recommendation entered June 27, 1991, is affirmed, and Plaintiff Richard Moulton's complaint and jury demand filed August 2, 1991, is dismissed with prejudice.

July 19, 1991 CAROL C. FITZGERALD
Clerk (By) Deputy Clerk
/s/ Kandy Capozi

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

RICHARD E. MOULTON, Plaintiff, v. KENNETH C. CORY, Defendant.	CV-S-90-502-PMP (LRL) ORDER **(FILED JULY 19, 1991)**

On May 9, 1991, Defendant Kenneth Cory filed a Third Motion to Dismiss for Discovery Violations (#44). On June 11, 1991, Plaintiff Richard Moulton filed a Response in Opposition to Defendant Cory's Third Motion to Dismiss for Discovery Violations (#47), and a supplement thereto on June 13, 1991 (#48).

On June 27, 1991, the Honorable Lawrence R. Leavitt, United States Magistrate Judge, entered his Report and Recommendation (#52) which concludes and recommends that Defendant Cory's Motion to Dismiss for Discovery Violations (#44) should be granted.

On July 16, 1991, Plaintiff Moulton filed Objections to Magistrate Judge Leavitt's Report and Recommendation (#54) to which Defendant Cory Responded (#55) on July 17, 1991.

The Court has conducted a *de novo* review of the record in this case in accordance with 28 U.S.C. § 636(b)(1)(B) and (C) and Local Rule 510-2. The Court finds that the record in this case demonstrates Plaintiff Moulton's utter disregard for the rules and Court's Orders governing the discovery process, and that no

alternative sanction is appropriate at this time other than dismissal of Plaintiff's Complaint. The Report and Recommendation of Magistrate Judge Leavitt is well reasoned, well grounded in the law and supported by the facts before the Court.

IT IS THEREFORE ORDERED that the Report and Recommendation of Magistrate Judge Leavitt (#52) entered June 27, 1991, is affirmed, that Plaintiff Moulton's Objections (#54) are denied, and that Plaintiff Richard Moulton's Complaint and Jury Demand (#1) filed August 2, 1990, is dismissed with prejudice.

DATED: July 19, 1991

/s/ P M P
PHILIP M. PRO
United States District Judge

APPENDIX L

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

RICHARD E. MOULTON, Plaintiff, v. KENNETH E. CORY, Defendant.	CV-S-90-502-PMP (LRL) **REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE** Cory's Third Motion to Dismiss for Discovery Violations (#44)

This matter comes before the Court on Cory's Third Motion to Dismiss for Discovery Violations (#44, filed May 9, 1991). Defendant's untimely Opposition (#47) was filed on June 11, 1991. His Supplemental Opposition (#48) was filed on June 13, 1991. The Court has considered the motion and Plaintiff's memoranda in opposition thereto, and based thereon issues this Report and Recommendation.

BACKGROUND

This is an action for declaratory relief and monetary damages brought by Plaintiff RICHARD E. MOULTON against Defendant KENNETH C. CORY. Moulton, a Nebraska resident, is proceeding in pro per. Cory, a Las Vegas attorney, is represented by counsel. The underlying

cause of action arose out of Cory's representation of Moulton on misdemeanor charges in Las Vegas Justice Court. The instant motion to dismiss stems from Cory's frustrated efforts to depose Moulton.

On August 2, 1990, Moulton filed his Complaint and Jury Demand (#1); sometime thereafter, the parties commenced discovery. On December 28, 1990, Cory filed notice to take Moulton's deposition in the Las Vegas offices of Cory's counsel on February 8, 1991. Notice of Deposition of Richard Moulton (#10). On January 24, 1991, Moulton, contending that it would be financially burdensome for him to travel to Las Vegas, filed a motion for a protective order seeking to vacate this deposition. Plaintiff's Motion for Protective Order (#15). On January 29, 1991, the undersigned Magistrate Judge denied Moulton's motion, because he "failed to meet his burden of establishing the degree of hardship which would justify the entry of a protective order." Order (#19). Although the Court had denied his motion, Moulton did not show up for his scheduled deposition on February 8, 1991. Cory's Second Motion to Dismiss (#23), Exhibit E. He did not telephone or otherwise communicate to Cory that he would not be attending his deposition. *Id.*

On February 11, 1991, Cory moved to dismiss this action for, *inter alia,* Moulton's failure to appear at his scheduled deposition. Cory's Second Motion to Dismiss (#23). Also on February 11, 1991, Moulton moved for reconsideration of the denial of his protective order. Moulton's Request for Reconsideration (#24). However, before the undersigned could rule on his request for reconsideration, Moulton filed objections to the Order

(#19) to the Honorable Philip M. Pro, United States District Judge. Plaintiff's Objections (#28). On February 25, 1991, the undersigned again found that Moulton had "failed to meet his burden of establishing that the costs of being deposed in Las Vegas would pose an undue hardship for him." Order (#32). On April 15, 1991, Judge Pro entered an order which (1) affirmed the undersigned's order denying Moulton's motion for a protective order, and (2) denied Cory's motion to dismiss.[1] Order (#39).

Following the denial of his motion to dismiss, Cory field a second notice to depose Moulton on May 14, 1991. Second Notice of Deposition of Richard Moulton (#40). Due to scheduling problems, on April 22, 1991, Cory amended the date of the deposition to May 9, 1991. Third Notice of Deposition of Richard Moulton (#41). On May 1, 1991, Moulton filed with the Clerk of the Court a copy of the Second Notice of Deposition of Richard Moulton. On this document Moulton had handwritten "BUSINESS TRAVEL PRECLUDES THIS . . . " Second Notice (#43).

On May 9, 1991, three events took place which brings this matter before the Court. First, Moulton failed to appear for his scheduled deposition. Cory's Third Motion to Dismiss (#44), Exhibit D. As with his earlier deposition, Moulton did not call or otherwise communicate to Cory that he would not attend. *Id.* Second, Moulton filed

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[1] Judge Pro also ordered Moulton to pay Cory's costs associated with the February 8, 1991 deposition plus $300.00 in attorney fees, and extended discovery an additional 60 days. Order (#39) at 6. Moulton has since sought reconsideration of the Order imposing sanctions. See Plaintiff's Motion for Relief (#46), which is presented pending.

his Second Motion for Protective Order (#43).[2] By this motion, Moulton again sought to prevent Cory from taking his deposition. This time, however, Moulton argued that he was entitled to "a protective order limiting Defendant's discovery to a means other than a live deposition," because "as pro se counsel, he is absolutely immune from being deposed by opposing counsel on the grounds of the work product rule. . . . "[3] *Id.* at 7 and 2. Finally, Cory filed the instant Motion to Dismiss for Discovery Violations (#44). Cory contends that Moulton's complaint must be dismissed because he has twice failed to attend properly noticed depositions.

ANALYSIS

A district court does have discretion to dismiss a complaint under Fed. R. Civ. P. 37 "where there has been flagrant, bad faith disregard of discovery duties." *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990) (citing *National Hockey League v. Metro Hockey Club, Inc.*, 427 U.S. 639, 643 (1976)); Fed. R. Civ. P. 37(d) (providing for the sanction of dismissal if a party fails to attend his own properly noticed deposition). However, before dismissing a complaint, the court must first consider the following five factors:

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[2] Moulton filed his motion for protective order at 2:22 p.m. on May 9, 1991. This was several hours after his deposition had been scheduled to take place. *Compare* Third Notice of Deposition of Richard Moulton (#41) *with* Plaintiff's Second Motion for Protective Order (#43).

[3] The undersigned entered an Order this day denying that motion.

> (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the other party; (4) the public policy favoring the disposition of cases on their merits; and (5) the availability of less drastic sanctions.

Adriana Intern. Corp. v. Thoeren, 913 F.2d 1406, 1412 (9th Cir. 1990) (quoting *Malone v. United States Postal Service*, 833 F.2d 128, 130 (9th Cir. 1987), *cert. denied sub nom. Malone v. Frank*, 488 U.S. 819 (1988)), *cert. denied sub nom. Lewis & Co. v. Thoeren*, 111 S.Ct. 1019 (1991).

A. Expeditious Litigation and Docket Management

The Court originally set a February 13, 1991, deadline for completion of discovery in this action. Scheduling Order (#8) at 3. Thereafter, at Moulton's request, the discovery cutoff date was extended to April 19, 1991. Order (#33). When Cory first moved to dismiss Moulton's complaint for discovery violations, Judge Pro again extended the discovery cutoff date. Discovery was extended another sixty days, up to and including June 14, 1991, so that Cory would have the opportunity to depose Moulton. Order (#39) at 5-6. Cory noticed a second deposition; however, Moulton again failed to appear. Consequently, discovery has again lapsed, and Cory has still not been able to depose Moulton. Even assuming that Moulton would now agree to be deposed by Cory, the Court would be forced to extend the discovery cutoff date a third time to accommodate Moulton's earlier actions. A

further extension is not warranted.[4] Therefore, factors one and two, the public's interest in expeditious litigation

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[4] Under Local Rule 190-1(b)(1), discovery extensions are not permitted except for "good cause shown. . . . " The Court here finds that Moulton has not shown good cause to extend discovery a third time. The delay in completing discovery in this case has been caused by Moulton's own failure to attend his own properly noticed depositions. In order to thwart Cory's efforts to depose him, Moulton twice filed a motion for a protective order. Both of these motions were wholly without merit.

In his first motion, Moulton argued that his deposition should be vacated, because it would be financially burdensome for him to travel to Las Vegas. The general rule is, of course, that "[i]n the absence of compelling circumstances or extreme hardship, a plaintiff should appear for a deposition in the forum of his choice – even if he is a nonresident." *Orrison v. Balcor Co.*, 132 F.R.D. 202, 203 (N.D. Ill. 1990); *accord Clem v. Allied Van Lines Intern. Corp.*, 102 F.R.D. 938 (S.D.N.Y. 1984). In support of his claim of financial hardship, Moulton submitted an affidavit stating that he is a licensed architect working at a rate of $90.00 per hour. Plaintiff's Affidavit in Support of Motion for Protective Order (#15). Moulton also submitted dubious estimates of his costs to travel to Las Vegas, including $1,496.00 for round-trip air fare (presumably from Lincoln, Nebraska), $90.00 per day for hotel expenses, and $60.00 per day for meals. *Id.* Having chosen to file his suit in the District of Nevada, Moulton has the burden of demonstrating either "compelling circumstances" or "extreme hardship" associated with being deposed in Las Vegas. He has fallen woefully short of meeting this burden.

Moulton also failed to appear at his first scheduled deposition even after the Court had denied his motion for a protective order. Although he filed both a request for reconsideration and objections to the order denying his motion, this did not relieve Moulton of his duty to attend the deposition. *See Williams v. American Tel. and Tel. Co.*, 134 F.R.D. 302, 303 (M.D. Fla. 1991) ("The filing of a motion for a protective order

and the court's need to manage its docket, both favor dismissal.

B. Prejudice

In determining whether prejudice exists, the Court looks to whether Moulton's actions have impaired Cory's ability to go to trial or otherwise threatened to interfere with a proper resolution of the case. *See Malone v. U.S. Postal Service*, 833 F.2d 128, 131 (9th Cir. 1987). There is little doubt that Cory has been prejudiced here. The discovery cutoff date has passed without Cory being able to depose Moulton. Certainly without the plaintiff's testimony, Cory will be hampered in his ability to defend this

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does not excuse the movant from complying with the discovery requested."). Moreover, both his request for reconsideration and his objections were filed *after* his scheduled deposition date. *See F.A.A. v. Landy*, 705 F.2d 624, 634 (2nd Cir.) (stating that only a court order, and not the filing of a motion, will act to stay a deposition), *cert. denied*, 464 U.S. 895 (1983).

In his second motion for a protective order, Moulton contended that he could not be deposed because, as a pro per litigant, he was also serving as his own counsel. This contention was without merit, because it ignored the fact that Cory sought to depose Moulton in his capacity as a plaintiff, not in his capacity as an attorney. *See Lockhart v. Sullivan*, 925 F.2d 214, 218-19 (7th Cir. 1991). Additionally, Moulton offered no explanation as to why he did not raise this issue in his first motion for a protective order (when it was surely available to him) or why he waited until *after* his second scheduled deposition before filing the motion for a protective order. *See infra* note 2; *see also In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 669 F.2d 620, 622 n.2 (10th Cir. 1982) (motion for a protective order is timely if it is made *before* the date set for producing the discovery).

action at trial. *See id.; see also Adriana Intern. Corp.*, 913 F.2d at 1412 (finding that "the repeated failure of [plaintiffs] to appear at scheduled [depositions] compounded by their continuing refusal to comply with court-ordered production of documents constitutes an interference with the rightful decision of the case"). Additionally, "[w]hether prejudice is sufficient to support an order of dismissal is in part judged with reference to the strength of the plaintiff's excuse for the default." *Malone*, 833 F.2d at 131. The Court has already found that Moulton's proffered excuses for failing to attend his depositions were groundless. *See infra* note 4.

C. Less Drastic Sanctions

After Moulton failed to attend his first scheduled deposition, Cory moved to dismiss this action under Rule 37. Cory's Second Motion (#23). Judge Pro found that less drastic sanctions were available and ordered Moulton to pay Cory the costs associated with the deposition and $300 in attorney fees. Order (#39). Although Moulton was not expressly warned that his failure to appear again could result in dismissal of his action, it was clear from Cory's Second Motion to Dismiss for Discovery Violations (#23) and Judge Pro's Order (#39) that dismissal as an ultimate sanction was a possibility. Moulton's failure to appear at his second deposition following the significant monetary sanction imposed by Judge Pro convinces this Court that less drastic sanctions[5] will be ineffective.

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[5] Less drastic sanctions for a pro per plaintiff include: " 'a warning, a formal reprimand, placing the case at the bottom of the calendar, a fine, the imposition of costs and attorney

The Court is now convinced that Moulton has absolutely no intention of giving his deposition in Las Vegas, regardless of the lesser sanctions that may be available.

D. Public Policy Favoring Disposition on the Merits

Moulton has seen fit to file suit in this District, yet he refuses to permit Cory to pursue what may be his single most effective discovery device, viz., the deposition of the plaintiff. In this Court's view, such a fundamental obstruction of the defendant's discovery rights outweighs the public policy favoring disposition of cases on their merits.

RECOMMENDATION

Based on the foregoing, it is the recommendation of the United States Magistrate Judge for the District of Nevada that Cory's Third Motion to Dismiss for Discovery Violations (#44) should be granted and that Moulton's Complaint and Jury Demand (#1) should be dismissed with prejudice.

Dated this 26th day of June, 1991.

/s/ **Lawrence R. Leavitt**
LAWRENCE R. LEAVITT
UNITED STATES
MAGISTRATE JUDGE

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fees, . . . [and] preclusion of [certain] claims. . . . ' " *Malone v. U.S. Postal Service*, 833 F.2d 128, 132, n.1 (9th Cir. 1987) (quoting *Titus v. Mercedes Benz of North America*, 695 F.2d 746, 749, n.6 (3rd Cir. 1982)).

APPENDIX M

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF
RICHARD E. MOULTON

DEFENDANT
KENNETH C. CORY,

DOCKET NO. CV-S-90-502-PMP(LRL)

PAGE 5 OF __ PAGES

DATE	NR.	PROCEEDINGS
	*	* *
1/14/91	14	SUBSTITUTION/ATTORNEY (PMP) ORD Bruce Judd sub for Kenneth Cory as cnsl for Ds Cps Dist. (AT) kc
	*	* *
8/5/91	58	**OPPOSITION** to Moulton's 2nd rqst for reconsdrtn obo D. (m) kc (NOTE: no 2nd rqst on file)
8/12/91	59	**SECOND REQUEST** to reconsid. ore & jdgmnt obo p. (m) kc (DISPO:)
8/14/91	60	**OUT OF PHASE PLEADINGS** re # 59 obo P. (m) kc
	*	* *

LOCAL RULE, U.S. DISTRICT COURT, NEVADA 120-7. APPEARANCES AND SUBSTITUTIONS.

* * *

(b) No attorney shall withdraw his/her appearance in any cause except by leave of court after notice served on his client and opposing counsel.

(c) Any stipulation to substitute attorneys shall be by leave of court and shall bear the signatures of the attorneys and of the client represented.

LOCAL RULE, U.S. DISTRICT COURT, NEVADA 190-1 DISCOVERY

(f) Discovery Motions.

* * *

(1) All motions to compel discovery shall, in addition to the discovery being sought in the motion, set forth in full the text of the discovery originally sought and the response made thereto, if any.

(2) Discovery motions will not be considered unless a statement of moving counsel is attached thereto certifying that, after personal consultation and sincere effort to do so, counsel have been unable to satisfactorily resolve the matter.

APPENDIX N

BRUCE M. JUDD, ESQ.
WRIGHT & STEWART . . .

Attorneys for KENNETH C. CORY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

RICHARD E. MOULTON, Plaintiff, vs. KENNETH C. CORY, Defendant.	)	Case No. CV-S-90-502-PMP (LRL)

CORY'S OPPOSITION TO MOTION TO MODIFY SCHEDULE

* * *

I

THERE IS NO GOOD REASON TO EXTEND DISCOVERY

. . . This case does not need to go on for purposes of discovery.

. . . This is not a complex case . . .

. . . Cory respectfully urges the Court to deny Moulton's motion.

DATED: 6 February 1991 WRIGHT & STEWART

/s/ Bruce M. Judd . . .
BRUCE M. JUDD, ESQ.

APPENDIX O

BRUCE JUDD
WRIGHT & STEWART . . .
Attorneys for KENNETH C. CORY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

RICHARD E. MOULTON, Plaintiff,	) Case No. CV-
	) S-90-502-PMP
vs.	) (LRL)
KENNETH C. CORY, Defendant.	)

SECOND NOTICE OF DEPOSITION OF RICHARD MOULTON

At 9:00 a.m. on 14 May 1991 at the law offices of Wright & Stewart, 302 E. Carson, Third Floor, Las Vegas, Nevada 89101, Cory's lawyer will take the deposition of Plaintiff Richard E. Moulton pursuant to Rule 30 of the Federal Rules of Civil Procedure.

DATED: 19 April 1991

/s/ Bruce Judd
BRUCE JUDD

CERTIFICATE OF MAILING

I certify that on the 19th day of April 1991, I caused a copy of the Second Notice of Deposition of Richard Moulton to be mailed in the United States Mails, postage prepaid, to the following person at his last known address:

Richard E. Moulton
1313 "F" Street, #9 1/2
Lincoln, Nebraska 68508

/s/ SE Fogleboch
An Employee of Wright
& Stewart

cor/mal b121.pld

APPENDIX P

BRUCE JUDD
WRIGHT & STEWART . . .
Attorneys for KENNETH C. CORY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

RICHARD E. MOULTON, Plaintiff,	) Case No. CV-
	) S-90-502-PMP
vs.	) (LRL)
KENNETH C. CORY, Defendant.	)

SECOND NOTICE OF DEPOSITION OF RICHARD MOULTON

At 9:00 a.m. on 14 May 1991 at the law offices of Wright & Stewart, 302 E. Carson, Third Floor, Las Vegas, Nevada 89101, Cory's lawyer will take the deposition of Plaintiff Richard E. Moulton pursuant to Rule 30 of the Federal Rules of Civil Procedure.

DATED: 19 April 1991

/s/ Bruce Judd
BRUCE JUDD

CERTIFICATE OF MAILING

I certify that on the 22nd day of April 1991, I caused a copy of the Second Notice of Deposition of Richard Moulton to be mailed in the United States Mails, postage prepaid, to the following person at his last known address:

Richard E. Moulton
1313 "F" Street, #9 1/2
Lincoln, Nebraska 68508

/s/ SE Fogleboch
An Employee of Wright
& Stewart

S183.pld cor/mal

APPENDIX Q

BRUCE JUDD
WRIGHT & STEWART . . .
Attorneys for KENNETH C. CORY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

RICHARD E. MOULTON, Plaintiff, vs. KENNETH C. CORY, Defendant.	)	Case No. CV-S-90-502-PMP (LRL) **(FILED APRIL 22, 1991)**

THIRD NOTICE OF DEPOSITION OF RICHARD MOULTON

At 9:00 a.m. on 9 May 1991 at the law offices of Wright & Stewart, 302 E. Carson, Third Floor, Las Vegas, Nevada 89101, Cory's lawyer will take the deposition of Plaintiff Richard E. Moulton pursuant to Rule 30 of the Federal Rules of Civil Procedure.

DATED: 22 April 1991

/s/ Bruce Judd
BRUCE JUDD

CERTIFICATE OF MAILING

I certify that on the 22nd day of April 1991, I caused a copy of the Second Notice of Deposition of Richard Moulton to be mailed in the United States Mails, postage

prepaid, to the following person at his last known address:

Richard E. Moulton
1313 "F" Street, #9 1/2
Lincoln, Nebraska 68508

/s/ SE Fogleboch
An Employee of Wright & Stewart

S183.pld cor/mal

APPENDIX R

BRUCE JUDD
WRIGHT & STEWART . . .
Attorneys for KENNETH C. CORY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

RICHARD E. MOULTON, Plaintiff,	)	
vs.	)	
	)	Case No. CV-
KENNETH C. CORY, Defendant.	)	S-90-502-PMP
	)	(LRL)
	)	

SECOND NOTICE OF DEPOSITION OF RICHARD MOULTON

At 9:00 a.m. on 14 May 1991 at the law offices of Wright & Stewart, 302 E. Carson, Third Floor, Las Vegas, Nevada 89101, Cory's lawyer will take the deposition of Plaintiff Richard E. Moulton pursuant to Rule 30 of the Federal Rules of Civil Procedure.

DATED: 19 April 1991

/s/ Bruce Judd
BRUCE JUDD

BUSINESS TRAVEL PRECLUDES THIS . . .

dtd. 28 AP91

/s/ Richard E. Moulton
RICHARD E. MOULTON

cor/mal b121.pld

APPENDIX S

BRUCE M. JUDD, ESQ.
WRIGHT & STEWART
302 E. Carson, Third Floor
Las Vegas, Nevada 89101
(702) 382-4004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

RICHARD E. MOULTON, Plaintiff, vs. KENNETH C. CORY, Defendant.	Case No. CV-S-90-502-PMP (LRL)

CORY'S THIRD MOTION TO DISMISS FOR DISCOVERY VIOLATIONS; AFFIDAVIT OF BRUCE JUDD; EVIDENTIAL MATERIALS

Defendant Kenneth Cory moves this Court to dismiss the complaint of plaintiff Richard E. Moulton pursuant to Rule 37, Federal Rules of Civil Procedure because of Moulton's willful refusal to comply with his discovery obligations. Moulton refused for a second time to appear for his deposition.

This motion is based on the points and authorities and other evidential materials attached to this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I

INTRODUCTION

Moulton failed to appear for his deposition on 8 February after the Court denied Moulton's motion for a protective April 1991, the Court denied Cory's motion to dismiss Moulton's complaint because of Moulton's refusal to appear for his deposition. The Court, however, did order Moulton to pay before 14 June 1991 Cory's costs associated with the deposition and $300 in attorney's fees. Moulton has not paid yet the fees or costs. The Court also extended the discovery period until 14 June 1991.

On 19 April 1991, Cory noticed Moulton's deposition for a second time. (Exhibit A) This time, Cory scheduled the deposition for 14 May 1991. As a result of scheduling problems, on 22 April 1991, Cory sent out a third notice of Moulton's deposition, this time scheduling the deposition for 9 May 1991. (Exhibit B.)

On 1 May 1991, Cory's lawyer, Bruce Judd, received from Moulton the second notice of the deposition, with this statement from Moulton: "Business travel precludes this . . . dtd. 28 Ap 91." (Exhibit C) Cory never received any word from Moulton relative to the deposition scheduled for 9 May 1991. On 9 May 1991, Moulton did not appear for his deposition. (Exhibit D)

Under these circumstances, this Court should dismiss Moulton's complaint against Cory as we show in the next section.

II

RULE 37 COMPELS DISMISSAL OF THE COMPLAINT

Rule 37 provides that a court may dismiss a complaint if the plaintiff fails to appear for his or her deposition and/or fails to completely produce documents. We repeat by reference the points and authorities that we cited in our last motion to dismiss. When a plaintiff willfully refuses to appear for his deposition, then the appropriate sanction is dismissal of his case. There can be no question that Moulton's failure to appear twice for his deposition was willful.

The Court in its last order denying our motion to dismiss relied on *Thompson v. Housing Authority*, 782 F.2d 829, 831 (9th Cir.), *cert. denied*, 479 U.S. 829 (1986). The Court found the last time that Cory suffered no lasting prejudice and there were less drastic remedies available to the Court. Moulton's conduct in refusing to appear for a second time at his deposition shows that Cory is suffering prejudice and that there is no effective remedy short of dismissing Moulton's complaint against Cory.

III

CONCLUSION

Cory respectfully urges the Court to dismiss Moulton's complaint with prejudice for all of the reasons set forth in this motion and to award attorney's fees pursuant to Rule 37.

DATED: 9 May 1991

/s/ Bruce M. Judd
BRUCE M. JUDD

AFFIDAVIT OF BRUCE JUDD

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

Bruce Judd testifies as follows:

1. I am a lawyer duly authorized to practice law in the State of Nevada. I am a member of the law firm of Wright & Stewart which represents the defendant, Kenneth C. Cory, in this action. I am competent to testify and have personal knowledge of the facts stated in this affidavit.

2. Exhibit C is a true copy of a paper that I received in the mail on 1 May 1991.

/s/ Bruce Judd
Bruce Judd

Subscribed and Sworn to before
me this 8th day of May 1991,
SE Fogleboch
Notary Public in and
for Said County and State

(Seal) S. E. FOGLEBOCH
Notary Public,
State of Nevada
Appointment Recorded in
Clark County
My Appointment Expires
May 23, 1991

cor/mal b138.pld

EXHIBIT C

BRUCE JUDD
WRIGHT & STEWART . . .
Attorneys for KENNETH C. CORY

May 1, 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

RICHARD E. MOULTON, Plaintiff,	)	
vs.	)	Case No. CV-
KENNETH C. CORY, Defendant.	)	S-90-502-PMP
	)	(LRL)
	)	

SECOND NOTICE OF DEPOSITION OF RICHARD MOULTON

At 9:00 a.m. on 14 May 1991 at the law offices of Wright & Stewart, 302 E. Carson, Third Floor, Las Vegas, Nevada 89101, Cory's lawyer will take the deposition of Plaintiff Richard E. Moulton pursuant to Rule 30 of the Federal Rules of Civil Procedure.

DATED: 19 April 1991

/s/ Bruce Judd
BRUCE JUDD

BUSINESS TRAVEL PRECLUDES THIS . . .

dtd. 28 AP91

/s/ Richard E. Moulton
RICHARD E. MOULTON

cor/mal b121.pld

ORIGINAL

5-9-91 MOULTON

DISTRICT COURT CLARK COUNTY, NEVADA

RICHARD E. MOULTON, Plaintiff,	)	Case No: CV-S-90-502-PMP (LRL)
vs.	)	
KENNETH C. CORY, Defendant.	)	

NON-APPEARANCE OF RICHARD E. MOULTON

Taken at Law Office of Wright & Stewart
302 E. Carson Avenue, 3rd Floor
Las Vegas, Nevada, 89101

On Thursday, May 9, 1991
at 9:00 A.M.

Reported by: MARY ANN AMADOR C.S.R. No. 265. . . . 2. . . . 5-9-91 MOULTON 3 . . .

. . . MR. JUDD: I show that the time is 9:35 on May 9th. Mr. Moulton has not showed up for his deposition. Mr. Moulton has not called relative to his appearance at the deposition. We have been waiting here for about thirty-five minutes.

I do not have Mr. Moulton's telephone number because he's never provided it in the pleading filed with the Court. I am terminating the deposition.

. . . .

CERTIFICATE OF MAILING

I certify that on the 9th day of May 1991, I caused a copy of Cory's Third Motion to Dismiss for Discovery Violations; Affidavit of Bruce Judd; Evidential Materials to be mailed in the United States Mails, postage prepaid, to the following person at his last known address:

Richard E. Moulton
1313 "F" Street, #9½
Lincoln, Nebraska 68508

/s/ S.E. Fogleboch
An Employee of Wright & Stewart

APPENDIX T

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA NO. 91-16485

D.CT. NO. CV-S-90-502-PMP (LRL)

RICHARD E. MOULTON,

Plaintiff/Appellant,

v.

KENNETH C. CORY,

Defendants/Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEVADA

OPPOSITION TO APPELLANT'S FIRST MOTION
FOR EXTENSION OF TIME

RICHARD E. MOULTON
1313 "F" 9½
Lincoln, NE 68508
Appellant

WRIGHT & STEWART
BRUCE JUDD
302 E. Carson Avenu [sic]
Third Floor
Las Vegas, Nevada 89101
Attorneys for Appellee

* * *

APPENDIX U

WRIGHT & STEWART
302 EAST CARSON AVENUE
LAS VEGAS, NEVADA 89101

7 January 1992

FEDERAL EXPRESSED

Ninth Circuit Court of Appeals 450
Golden Gate Avenue, 18th Floor
San Francisco, Ca. 94102

Attention: Verna

Re: Moulton v. Cory; CA No. 91-16485

Dear Verna:

In the above-referenced case, the Court ordered a new briefing schedule. On 26 December 1991, the Court ordered appellant to file his opening brief within 30 days of December 26th, and ordered the appellee to file his brief within 30 days after service of appellant's brief.

There is some confusion because the appellant mailed an "Opening Brief" on 4 December 1991, but the appellant has stated in a "Notice" mailed on 30 December 1991, that he "possibly" will file an "Amended opening brief" within 30 days after 26 December 1991. Given all of the confusion, I am interpreting the Court's Order of 26 December as requiring me to file appellee's brief 30 days after appellant files his amended opening brief, or by 24 February 1992, if for some reason appellant does not do anything more before 25 January 1992.

APPENDIX V

BRUCE M. JUDD, ESQ.. . . .

Attorneys for KENNETH C. CORY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

RICHARD E. MOULTON, Plaintiff,	)	Case No.
	)	CV-S-90-502-PMP
vs.	)	(LRL)
KENNETH C. CORY, Defendant.	)	

CORY'S SUPPLEMENTAL RESPONSES TO PLAINTIFF'S FIRST SET OF ADMISSIONS DIRECTED TO DEFENDANT

Defendant Kenneth C. Cory supplements his response plaintiff's first set of admissions. . . .

. . . . **REQUEST TO ADMIT NO. 9:** Admit that you agreed to obtain any, and all transcribed court reporter notes, on Plaintiff's behalf, in cause number 11276-83M.

. . . . **RESPONSE TO REQUEST TO ADMIT NO. 9:** I deny your request.

. . . . **REQUEST TO ADMIT NO. 10:** Admit that you have not, as of this date, provided to Plaintiff the court reporter notes mentioned in the preceding request, number 9.

. . . . **RESPONSE TO REQUEST TO ADMIT NO. 10:** I admit that I did not receive the court reporter notes and that I have not provided to you those notes. . . .

DATED: 27 March 1991

/s/ Bruce Judd
BRUCE JUDD

APPENDIX W

BRUCE JUDD
WRIGHT & STEWART
302 E. Carson, Third Floor
Las Vegas, Nevada 89101
(702) 382-4004
Attorneys for KENNETH C. CORY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

RICHARD E. MOULTON, Plaintiff, vs. KENNETH C. CORY, Defendant.	Case No. CV-S-90-502-PMP (LRL)

CORY'S SUPPLEMENTAL RESPONSES TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION AND INSPECTION

. . . . **REQUEST TO PRODUCE NO. 10:** A complete and accurate copy of all documents, and/or pleadings which make up the entire file in Cause Number 11276-83M, including, but not limited to the following:

(f) The transcript of the official court reporter notes taken at the pretrial hearings on any matter, including matters of law raised by any Motion of Defendant, as well s [sic] the notes of the official court reporter taken during any argument of counsel for the defense, the State, or upon any statements or Orders of the Court;

. . . . **RESPONSE TO REQUEST TO PRODUCE NO. 10:** I do not know what documents the Court or the Clark County District Attorney's office possesses relative to case number 11276-83M. The attached documents numbered 000061 through and including 000127, are all of the documents in my custody, control or possession which could constitute the court or district attorney's file. . . .

. . . DATED: 27 March 1991

/s/ Bruce Judd
BRUCE JUDD, ESQ.

CERTIFICATE OF MAILING

I certify that on the 27th day of March 1991, I caused the original of Cory's Supplemental Responses to Plaintiff's First Request for Production and Inspection to be mailed in the United States Mails, postage prepaid, to the following person at his last known address:

Richard E. Moulton
1313 "F" Street, #9½
Lincoln, Nebraska 68508

/s/ S.E. Fogleboch
An Employee of Wright & Stewart

APPENDIX X

Case No.

IN THE JUSTICE COURT OF LAS VEGAS TOWNSHIP
COUNTY OF CLARK, STATE OF NEVADA

THE STATE OF NEVADA, Plaintiff,)	CASE NO. 11276
vs.)	
RICHARD E. MOULTON, Defendant.)	DOCKET NO. 83M

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE KELLY O. SLADE,
JUSTICE OF THE PEACE

January 4, 1984

9:00 o'clock A.M.

APPEARANCES:
For the State: NANCY CESTERLE, ESQ.

Deputy District Attorney

For the Defendant: No appearance

MICROFILMED
NOV 21, 1986

Reported by: LAURIE H. WEBB
Official Court Reporter
C.S.R. No. 50

APPENDIX Y

ORIGINAL

Case No.

IN THE JUSTICE COURT OF LAS VEGAS TOWNSHIP
COUNTY OF CLARK, STATE OF NEVADA

THE STATE OF NEVADA, Plaintiff, vs. RICHARD E. MOULTON, Defendant.	CASE NO. 11276 DOCKET NO. 83M

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE KELLY O. SLADE,
JUSTICE OF THE PEACE

January 4, 1984

9:00 o'clock A.M.

APPEARANCES:
For the State: NANCY CESTERLE, ESQ.
Deputy District Attorney

For the Defendant: No appearance

MICROFILMED
NOV 21, 1986

Reported by: LAURIE H. WEBB
Official Court Reporter
C.S.R. No. 50

APPENDIX Z

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

RICHARD E. MOULTON, Plaintiff	)	NO:
	)	CV-S-90-502-
-VS-	)	PMP (LRL)
KENNETH C. CORY, Defendant	)	
STATE OF NEBRASKA	)	AFFIDAVIT
	)	OF RICHARD
COUNTY OF LANCASTER	)	MOULTON

BEFORE ME, the undersigned authority, on this day personally appeared RICHARD E. MOULTON who, by me, having been first duly sworn, upon his oath made the following affidavit:

I am Richard E. Moulton, the Plaintiff in the above-styled and numbered cause. Exhibits E1 through E5 attached herewith are true and exact copies of discovery documents submitted by Cory on 27 March, 1991, in his Response to Plaintiff's Request to Produce No. 10, namely 000106 – 000121.

Exhibits F1 through F5 are true and exact copies of documents copied from the originals and furnished to me by the Clerk of the Justice Court, Clark County, Nevada in July of 1991.

Exhibits G1 through G5 are true and exact copies of documents copied from microfilm records of the original documents and furnished to me by the Clerk of the Justice Court, Clark County, Nevada, on 25 June, 1992.

I have compared the documents Cory provided me when responding to my discovery request during the litigation of this cause, and the results of my comparison revealed that Cory's documents have been altered. Specifically, it is apparent that Cory covered up or in some fashion, deleted all of the original file markings initially made on the papers by both the Court Reporter and the Clerk of the Justice Court. I am prepared to show this Court, should it indicate it will entertain my attached motion, that Cory's documents were in fact altered. I therefore ask the Court to permit me to move forward with my attached motion, initiate discovery, and present my arguments on the issues therein raised.

AFFIANT FURTHER sayeth not.

/s/ Richard E. Moulton
RICHARD E. MOULTON,
Affiant

SWORN TO AND SUBSCRIBED before me, the undersigned authority, by RICHARD E. MOULTON, on this the 17 day of July, 1992.

[SEAL] /s/ Craig A. Anderson
NOTARY PUBLIC in and for the
State of Nebraska